Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1830

MARTIN HEISE,

Petitioner,

v.

VILLAGE OF PEWAUKEE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

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May 15, 1980

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PETITION FOR A WRIT OF CERTIORARI
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OF THE STATE OF WISCONSIN

The petitioner, Martin Heise, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Wisconsin entered in this proceeding on November 6, 1979.

The opinion of the Supreme Court of Wisconsin, which appears in the Appendix hereto, p. A-38, infra, is reported at 92 Wis.2d 333 (1979), and is also reported in 285 N.W.2d 859.

An opinion of the County Court of Waukesha County dated December 27, 1976 is reprinted in the Appendix hereto, p. A-1, infra, and is not reported.

JURISDICTION

The judgment of the Supreme Court of the State of Wisconsin was entered on November 6, 1979. A timely motion for reconsideration was entertained and denied on December 21, 1979. On March 6, 1980, Mr. Justice Stevens signed an order extending the time for filing this petition for certiorari to and including May 19, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3).

QUESTIONS PRESENTED

1. Whether when presented with allegations by a party of facts calling in question the trial court's impartiality, due process of law requires the trial court to either refer the allegations to another judge for determination or to restrict review of the allegations to determining their legal sufficiency

without passing on the truth of the matters alleged and requires the judge to disqualify himself if the allegations are legally sufficient.

2. Whether in a non-jury action determining entitlement to land receipt by the trial court of information outside the record on the facts and the law to be applied to them without giving notice to the parties and a right to confront the person giving the information and advice and a right to be heard constitutes a denial of due process rights guaranteed by the Fourteenth Amendment.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Fourteenth Amendment, United States Constitution:

> Section 1 . . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . .

Wisconsin Statutes (1977), §757.19(2):

> Any judge shall disqualify himself or herself from any civil or criminal action or proceeding when one of the following situations occurs: . . . (g) when a judge deter-

mines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner.

Standard 3, Wisconsin Code of Judicial Ethics, 36 Wis.2d 252, 256:

3. A judge should be temperate, attentive, patient, industrious, and, above all, impartial. He should administer the law free of partiality and the appearance of partiality. To that end he should avoid membership in, or association with, an organization whose objectives, policies, or activities are incompatible with a fair and even handed administration of justice.

Standard 10, Wisconsin Code of Judicial Ethics, 36 Wis.2d 252, 258:

10. A judge should always bear in mind the need of scrupulous adherence to the rules of fair play. He should not permit private interviews, arguments, briefs or communications designed to influence his decision. He should not act upon ex parte applications unless the necessity for prompt action is clearly shown, granting relief only when fully satisfied that the law permits it

and the emergency requires it.

RAISING THE FEDERAL QUESTION

After trial of this matter, and after issuance of the trial court's opinion dated December 27, 1976, but before the approval of findings of fact and conclusions of law and entry of judgment, petitioner received information that the judge who presided at the non-jury trial, the Honorable Neal Nettesheim, had discussed petitioner's case with a Waukesha County Assistant District Attorney, Robert Daley, prior to issuing his opinion. Petitioner also learned that a witness in the trial, Michael Chapman, who had testified for petitioner, had been Judge Nettesheim's campaign manager and had learned that Mr. Chapman would directly benefit from a decision against Mr. Heise and in favor of the Village of Pewaukee because he owned property adjacent to the property in dispute. On January 31, 1977 petitioner telephoned Judge Nettesheim. Petitioner asked the Judge to have his decision put aside and the

case retried. He also asked that an impartial party handle his assertions concerning the matters heard without notice to the parties or their counsel. Petitioner raised with Judge Nettesheim the fact that no notice was given of the communications with Robert Daley and pointed out that Daley had been a tenant in a home near the property in question which was owned by a witness who testified for the Village and against petitioner at trial.

On February 22, 1977, a hearing in this case was held before Judge Nettesheim at which Judge Nettesheim placed on the record his recollection of the telephone conversation. Judge Nettesheim indicated that petitioner had requested the Judge to reopen the case and reevaluate its decision. Judge Nettesheim ruled that his decision would stand unless reversed by appeal. Judge Nettesheim did so after noting that petitioner's comments went directly to the integrity of the Court's decision in the case and after stating that petitioner's allegations were false or totally without merit.

Petitioner was represented by counsel before the Supreme Court of Wisconsin. Petitioner presented his arguments concerning his claim that he was denied a fair and impartial trial in oral argument to the Supreme Court of Wisconsin on October 8, 1979, pro se. Mr. Chief Justice Bruce Beilfuss questioned Mr. Heise concerning his position on whether it was proper for a trial judge to go outside of the record to help him make a decision. Heise responded that he supposed it was all right if the Judge notifies all parties in the suit which was not done in this case. In his conclusion in his reply brief to the Wisconsin Supreme Court, petitioner Heise stated:

> The trial court's decision was inconsistent with the evidence and the conduct of the Honorable Neal Nettesheim during and after the trial was more than suspect as being bias (sic) against the plaintiff-appellant.

Neither of the opinions written in this case reflect consideration by the trial court or the Supreme Court of the questions raised by this petition.

Judge Nettesheim's opinion was released prior to petitioner's obtaining knowledge of the facts supporting his contentions questioning the impartiality of Judge Nettesheim's decision. The Supreme Court of Wisconsin in its decision chose to ignore petitioner's assertions of denial of his right to a fair and impartial trial. Neither Judge Nettesheim nor the Supreme Court of Wisconsin has raised any question as to whether or not petitioner's request for a new trial or reconsideration in light of his assertions of facts demonstrating lack of impartiality were properly asserted. Petitioner raised the matters with the trial court promptly upon their discovery and personally argued them to the State Supreme Court.

This case is proper for consideration by the United States Supreme Court despite the failure of the State Supreme Court to rule on petitioner's claims of denial of due process of law. This Court has recognized that it may properly review constitutional issues even where they have been ignored by the appellate courts if they were raised in the trial

court and substantial efforts were made to raise them with the appellate court as well. Chambers v. Mississippi, 410 U.S. 284, 289 fn. 3, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).

In this case the Supreme Court affirmed a judgment which determined that petitioner Heise did not have title to the property in question and foreclosed a number of defenses to the charge of obstruction of a village street. Although the Supreme Court of Wisconsin did not expressly mention the due process issues, the Supreme Court's affirmance necessarily decided those issues against petitioner's claims. Furthermore, Heise's claim was brought to the attention of the State Court with fair precision and in due time. Street v. New York, 394 U.S. 576, 581-584, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969).

STATEMENT OF THE CASE

In the summer of 1976 petitioner, Martin Heise, began construction of a garage and patio adjacent to his house on the shores of Pewaukee Lake by pouring a concrete garage slab and patio

slab. The Village of Pewaukee, respondent herein, claimed the slab was partially on property to which it had title because it was an extension of Lake Street between Park Avenue and the shores of Lake Pewaukee. The city charged petitioner under a local ordinance for obstructing a Village street. Petitioner brought an action to quiet title against the Village, claiming title through a quitclaim deed from the heirs of those who owned the land in dispute prior to its transfer to the Village or its dedication as a street. Petitioner also claimed that if the land was properly dedicated or transferred to the Village, a reversionary clause and a deed of the property to the Village had taken effect. That reversionary clause in an 1896 deed provided in relevant part as follows:

> Said piece to be accepted, kept, used and maintained by any grantee as and for a public street or highway approach to said lake and for no other purpose, and in case of the discontinuance of such use and maintenance, said piece shall revert to said grantors, theirs (sic) or assigns.

Both the ordinance violation matter and the quiet title action were tried to the Court before the Honorable Neal Nettesheim of the County Court of Waukesha County. Subsequent to trial Judge Nettesheim issued an opinion on December 27, 1976. (App. p. 1, et seq.) The Court concluded that the area in question was and remains dedicated to the Village of Pewaukee by petitioner's predecessors in title and that the Village's claims to the disputed area of Lake Street is superior to that of petitioner's.

Petitioner learned that Judge Nettesheim discussed petitioner's case with an assistant district attorney, Robert Daley, in his chambers prior to rendering his opinion. Petitioner also learned that Mr. Daley had been a tenant in a home in the immediate vicinity of the land in question. He also learned that that home was owned by a Mr. White. Mr. White had testified as a witness for the Village in the trial of this matter. Petitioner also learned that a witness in the proceeding, Michael Chapman, had served as campaign manager for the Judge

in a judicial election. This relationship between Judge Nettesheim and the witness had not been disclosed. Petitioner also learned that Mr. Chapman had an interest in the outcome of the action because his property was adjacent to the land in dispute and would directly benefit from a decision that the property belonged to the Village. Petitioner also received information that Judge Nettesheim had been out on the property between the time of trial and the time of his decision. Petitioner later determined that the contention that the Judge viewed the property without notice to the parties was without foundation. Petitioner has not pursued the allegation that the Judge viewed the property and does not pursue that matter in this Court.

On January 31, 1977 petitioner telephoned Judge Nettesheim and discussed the three matters outlined above with him. He told Judge Nettesheim that he had confirmed with Mr. Daley that Mr. Daley had discussed petitioner's case with Judge Nettesheim in Judge Nettesheim's chambers. Judge Nettesheim in-

quired if petitioner was telling him that the Court had gone outside the record to get information. Mr. Heise confirmed that that was what he was told. Judge Nettesheim confirmed that Mr. Daley had told him that Mr. Daley lived right across the street or a block away up until a year ago and that he was familiar with the place. Petitioner also expressed his concern that Mr. Chapman, who had been a witness in petitioner's case, had been the Judge's campaign manager. Judge Nettesheim indicated that he would hold a hearing on these matters and would order in any person who had supplied information to petitioner or he would order petitioner at such a hearing to disclose who the people were at such a hearing. Mr. Heise indicated to the Judge that he understood that the people who had talked to him were afraid for their particular jobs and he told the Judge that maybe he should go to somebody else so that he could have a hearing on these matters. Judge Nettesheim made no response to petitioner's expressed understanding that the people who had told him of these matters were afraid for their jobs.

Judge Nettesheim claimed that he did not turn to anybody to help him make his decisions except the lawyers. Judge Nettesheim also denied ever being at the site in question. Judge Nettesheim cautioned petitioner very strongly to check the accuracy of information. The Judge urged petitioner to put his complaints on the record. Petitioner indicated that he would like to have the decision put aside and retried if his complaints were in fact the case. Petitioner also indicated to the Judge that if the Judge was going to tie in the other people and those people would be afraid of losing their jobs if they did come up with the information supplied to petitioner and testified to this, that he would rather have an impartial party handling this. Judge Nettesheim did not indicate that he would refer the matter to another decider.

Subsequent to the January 31 conversation, Judge Nettesheim convened a hearing on February 22, 1977. The transcript of that proceeding is found in the appendix to this petition at p. A-31. At that hearing petitioner's

attorney, Mr. Ratzel, indicated to the Court that he was in Florida at the time of petitioner's telephone call to the Judge and that he did not intend to participate in or make any statements with regard to petitioner's assertions. Thus petitioner was unrepresented by counsel with regard to these matters at the time of the February 22, 1977 hearing. Mr. Heise declined to make a record concerning his assertions at that time. The Court set forth his recollection of the telephone conversation in any event. He described petitioner's allegations as one that "the decision rendered by the Court in this case had been either written by another or that the Court had received added information beyond the record in this case apparently in the form of amicus curiae information. . . from other sources and other lawyers." The Court stated "That statement is false." (App. p. A-34)

The Court stated that petitioner indicated "the decision in this case ran to the financial inurement and benefit of Mr. Michael Chapman, who was a witness in the case, and that since Mr.

Chapman had been associated with a political campaign of this Court that therefore the decision and the integrity of the decision of the Court was suspect." Judge Nettesheim went on:

> I would only observe, firstly, that Mr. Chapman was Mr. Heise's witness, not the Village's witness; that Mr. Chapman was a paid, and I might observe well paid, campaign advertising person in the campaign of this Court, and the suggestion and inference drawn by Mr. Heise under the circumstances of this case is totally without merit. (App. p. A-35).

The Court also stated that petitioner indicated that the Court had been on the premises on one or perhaps more occasions during the pendency of this action and apparently while preparing and rendering its decision. The Court indicated that this statement was equally false as the others. (App. p. A-35).

The Court also indicated that petitioner requested that "if in the light of those remarks this Court would not be inclined to perhaps reopen or apparently reevaluate its decision." (App. p. A-36). The Court went on to state:

> Well, that is nothing short, in my judgment, Mr. Heise, of judicial blackmail, and I assure you this decision stands and will continue to stand unless reversed by appeal, which is your absolute right under the law, and Mr. Ratzel is apparently taking steps to see that that right is protected, but the fact that these allegations had been made, the fact that apparently the defendant, Mr. Heise, would presume that this Court would do nothing about them is a situation which this Court simply could not permit to endure, and even though the defendant has chosen not to make the record here today the Court feels compelled in this respect to make a record.

On April 20, 1977 Judge Nettesheim entered judgment against petitioner and petitioner appealed to the Supreme Court of Wisconsin.

As a result of Judge Nettesheim's decision and its affirmance by the State Supreme Court, petitioner has been deprived of title and ownership of the

disputed parcel of land and has been found in violation of the Village ordinance prohibiting obstructing a Village street. Proceedings regarding removal of the obstruction are pending.

REASONS FOR GRANTING THE WRIT

This case presents the question of what procedure is constitutionally required for presenting and resolving allegations by a litigant of facts inferring lack of impartiality of the trial judge in a case tried to the Court. Under what circumstances, if any, does due process require that the facts asserted, the inferences drawn therefrom, or the consequences for further action in a lawsuit should be decided by someone other than the Judge whose conduct is called in question? What is the proper scope of the role of the Judge whose impartiality is questioned in determining any or all of these issues? These questions are significant and recurring problems which are common to almost all types of litigation, both criminal and civil, entertained by both state and federal courts.

Petitioner contends that when presented with facts bearing on the trial court's impartiality, Judge Nettesheim both refused to refer the matter to another judge or other impartial decider for determination of the truth or falsity of the allegations and conducted a proceeding at which he found the factual assertions of petitioner to be false. The trial judge did not restrict his role to a determination of the legal sufficiency of the allegations and then disqualified himself if they were determined to be sufficient. In fact he did not expressly determine the legal sufficiency of the allegations at all. He denied the allegations and then found they were false. He then denied petitioner's request for reconsideration or a new trial.

In the context of interpretation of the Federal Statutes providing for the filing of affidavits of bias and prejudice in Federal Court proceedings, this Court has ruled that once the motion is filed seeking removal of the judge, the judge must pass on the legal sufficiency of the affidavit, but may

not pass on the truth of the matters alleged. See Berger v. United States, 255 U.S. 22, 41 S.Ct. 230, 65 L.Ed. 481 (1921). The Court stated in relevant part:

> But we may say that its solicitude is that the tribunals of the country shall not only be impartial in the controversies submitted to them, but shall give assurance that they are impartial, -- free, to use the words of the section, from any "bias or prejudice" that might disturb the normal course of impartial judgment. And to accomplish this end the section withdraws from the presiding judge a decision upon the truth of the matters alleged. Berger v. United States, supra, p. 35-36.

The Court went on to explain:

> To commit to the judge a decision upon the truth of the facts gives chance for the evil against which the section is directed. The remedy by appeal is inadequate. It comes after the trial, and if prejudice exists, it has worked its evil, and a judgment of it in a reviewing tribunal is precarious. It goes there

> fortified by presumptions, and nothing can be more elusive of estimate or decision than a disposition of a mind in which there is a personal ingredient. Berger, supra, p. 36.

It is the view of petitioner that the result reached in Berger restricting the role of the Court in considering allegations of bias and prejudice directed personally at the Court, constitutes an attempt to avoid the necessity for requiring determination of the allegations by someone other than the trial judge himself and is an attempt to assure due process of law without the inconvenience of referring the matter to another judge.

The lower federal courts have apparently experienced some difficulty in interpreting and applying the Berger rule. See especially the specially concurring opinion of Circuit Judge Gee in Parrish v. Board of Commissioners of Alabama State Bar, 524 F.2d 98, 105 (1975). Circuit Judge Gee expresses his doubt that Berger v. United States, supra, remains good law. He describes Berger as representing "an outdated rule

which has been made tolerable in present circumstances only by engraftment of dubious exceptions."

Petitioner refers to Circuit Judge Gee's opinion not because petitioner agrees with his analysis nor the direction in which his analysis would lead. His opinion is referred to because it illustrates the diversity of interpretation of various courts and the generally unsettled nature of the law in this area. Circuit Judge Gee identifies only three workable modes of deciding the issue of bias or prejudice: "(1) peremptory disqualification upon the mere filing of an affidavit; (2) decision of the issue by another magistrate than the one accused; or (3) decision either of actual bias or the reasonable appearance of it by the magistrate sought to be disqualified." Ibid. at p. 106. Petitioner would urge this Court to require that assertions of facts which reasonably call in question the impartiality of the judge, at least where the allegations are of conduct of the judge himself, rather than merely assertions of appearances of conflicts arising from

past relationships with parties, witnesses or other participants in the process of litigation should be decided by another magistrate than the one accused. In any event the petitioner requests the Court to consider as a minimal requirement on State Court judges adherence to the limitations in Berger v. United States, the determination by the judge of the legal sufficiency of the allegations rather than the truth or falsity of the factual assertions themselves. It should be noted that the allegations in this case meet the concern raised in United States v. Grinnell Corp., 384 U.S. 563, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966), that the alleged bias "must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." In this case petitioner's allegations are that the trial judge went outside the record to obtain information without giving notice to the parties, an opportunity to confront and cross-examine the person giving the information, and without an opportunity to be heard re-

garding the factual information and legal positions communicated. Similarly, the prior business and campaign relationship between the Judge and the witness constitutes an extrajudicial source within the meaning of the language quoted from United States v. Grinnell Corp.

This Court has long recognized the importance and significance of an assurance of an impartial judge to securing the guarantee to due process of law provided for in the Fourteenth Amendment. See especially, Ward v. Monroeville, 409 U.S. 57, 334 L.Ed.2d 267, 93 S.Ct. 80 (1972), reaffirming the holding of Tumey v. Ohio, 273 U.S. 510, 71 L.Ed. 749, 47 S.Ct. 437, 50 A.L.R. 1243 (1927). Ward v. Monroeville, supra, like this case, was a local ordinance violation action. In that case the Court found that the fact that the revenue produced from the Mayor's Court provides a substantial portion of a municipality's funds from which the Mayor's salary was paid, presented facts establishing a violation of the Fourteenth Amendment and its due process provisions.

This Court has also recently reaffirmed the teaching of In re Murchison, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955), that "a fair trial in a fair tribunal is a basic requirement of due process." Withrow v. Larkin, 421 U.S. 35, 43 L.Ed.2d 712, 95 S.Ct. 1456 (1975). The Court in Withrow stated: "Not only is a biased decisionmaker constitutionally unacceptable but 'our system of law has always endeavored to prevent even the probability of unfairness.' (Citation omitted)." Id. at p. 47.

The procedure followed by the trial court did not expressly address the question of the legal sufficiency of petitioner's allegations. This Court has recognized, however, the constitutional significance of consideration of information outside the record. This Court stated:

> A party is entitled, of course, to know the issues on which decision will turn and to be apprised of the factual material on which the agency relies for decision so that he may rebut it. Indeed, the Due Process Clause forbids an agency to use evidence in a way that

> forecloses an opportunity to offer a contrary presentation. Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U.S. 292, 57 S.Ct. 724, 81 L.Ed. 1093 (1937); United States v. Abilene & S.R. Co., 265 U.S. 274, 44 S.Ct. 565, 68 L.Ed. 1016 (1924). Bowman Trans. v. Arkansas-Best Freight, 419 U.S. 281, 289 fn.4, 95S.Ct. 438, 42 L.Ed.2d 447 (1974).

Wisconsin law recognizes the importance of avoiding ex parte communications designed to influence a judge's decision. Standard 10 of the Wisconsin Code of Judicial Ethics provides as follows:

> 10. A judge should always bear in mind the need of scrupulous adherence to the rules of fair play. He should not permit private interviews, arguments, briefs or communications designed to influence his decision. He should not act upon ex parte applications unless the necessity for prompt action is clearly shown, granting relief only

> when fully satisfied that the law permits it and the emergency requires it. 36 Wis.2d 252, 258, 153 N.W.2d 873 (1967).

The Wisconsin Supreme Court has stated:

> It will often happen that a judge, particularly where he resides in the same community with the parties, will have some awareness of the backround of the dispute which comes into his court but his decision must always be based solely on the facts brought out before him during the course of the proceeding. Unless he is certain that he can put aside such information as may have come to him outside the record and such opinions as he may have formed thereon he must disqualify himself. Ausman v. Ausman, 31 Wis.2d 79, 86 (1965).

The Wisconsin legislature has recently revised the law on disqualification of judges. The law which became effective August 1, 1978 makes clear that a judge should disqualify himself when it appears he or she cannot act in an impartial manner. Section 757.19 of

the Wisconsin Statutes reads in relevant part:

> (2) Any judge shall disqualify himself or herself from any civil or criminal action or proceeding when one of the following situations occurs: . . .
>
> (g) When a judge determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner.

The predecessor section of the Wisconsin Statutes was not as explicit. Section 256.19 stated in relevant part:

> In case any judge of any court of record shall be interested in any action or proceeding in such court . . . such judge shall not have power to hear and determine such action or proceeding or to make any order therein, except with the consent of the parties thereto.

The Wisconsin legislature has now made it clear that in cases where a judge determines that it appears he cannot act in an impartial manner, not just in cases where he determines he cannot act in an impartial manner, he should disqualify himself.

Unfortunately the Wisconsin Supreme Court has not in its statutes or opinions set forth the process by which determinations of disqualification are to be made.

In any event this Court has ruled that due process of law requires that a judge not sit on a case where an appearance of bias requires his disqualification. This Court has stated:

> But contemptuous conduct, though short of personal attack, may still provoke a trial judge and so embroil him in controversy that he cannot "hold the balance nice, clear, and true between the state and the accused. . ." Tumey v. Ohio, 273 U.S. 510, 532, 47 S.Ct. 437, 444, 71 L.Ed. 749 (1927). In making this ultimate judgment, the inquiry must be not only whether there was actual bias on respondent's part, but also whether there was "such a likelihood of bias or an appearance of bias that the judge was unable to hold the balance between vindicating the interests of the court and the interests of the accused." Ungar v. Sarafite, 376 U.S. 575, 588, 84 S.Ct. 841, 849, 11 L.Ed.2d 921 (1964).

> "Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties," but due process requires no less. In re Murchison, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955). Taylor v. Hayes, 418 U.S. 488, 501, 94 S.Ct. 2697, 41 L.Ed.2d 897 (1974).

In this case the procedure of requiring petitioner to present his allegations to the trial judge, and the trial judge's decision to respond to and rule on those allegations himself, both with regard to their factual basis and the legal and actual implications for his impartiality in reaching his decision, may have contributed to the creation of a situation where the trial judge could not longer hold the balance between the interests of the Court and the interests of petitioner. See, for example, the Judge's response to petitioner's request for reopening or reevaluating its decision in light of petitioner's allegations quoted at page 17 above.

The trial court's description of Mr. Heise's raising of factual allegations as constituting judicial blackmail seriously questions the capacity of the Judge to hold the balance, nice, clear and true between his interests and the interests of petitioner.

Unfortunately the Wisconsin Supreme Court has not since 1853 discussed the problems presented when allegations are made of bias or prejudice and those allegations are to be considered in the course of a lawsuit. The Wisconsin Supreme Court in Hungerford v. Cushing, 2 Wis. 292 (1853), considered the problems presented for a judge when allegations of bias are presented to him. In that case the position was advanced that the judge when presented with affidavits in support of a motion to disqualify for prejudice, should decide the question of the condition of his own mind and feelings by extrinsic testimony, regardless of the actual condition of his mind and feelings as determined by his own consciousness. The Court distinguished the Wisconsin statute in effect at that time from statutes used in other cases on the

basis that in those cases the judge had no discretion when the affidavit was made and was in conformance with the statute. The Court determined that the Wisconsin judge had discretion to decide the factual validity of the allegations in the affidavits. This, however, was dicta because it held that in any event the issue was not appealable. The Court stated in its opinion:

> A scene cannot well be imagined, which would be more disgraceful to a court, or better calculated to bring contempt and ridicule upon it, than a trial of such a question, conducted upon the principles contended for by the appellants. If the testimony contained in the affidavits of the parties is to prevail, regardless of the actual findings of the judge, his private and social relations, his friendships, his animosities, real or supposed, expressions which he may have made heedlessly in relation to the parties, or some one of them, his private conversation, and the interests of his friends, all would be made the subjects of judicial investigation before himself, and any opinion

> which he might form upon such testimony, would be subject to review in this court. Id. at 298-299.

It is the contention of petitioner, however, that the difficulties presented from attempting to restrict the role of the Judge to consideration of extrinsic facts and the reasonable inferences which can be drawn from them with regard to lack of impartiality or bias, can best be avoided, not by insulating the trial court from any review of its determinations, but by setting forth situations where the issue should be determined by someone other than the judge who is alleged to have engaged in improper conduct or to be biased or prejudiced.

Taken together, this Court's decisions regarding the importance of assurance of an impartial decider as an aspect of due process of law mandate consideration by this Court of the constitutional adequacy of the procedures engaged in by the Wisconsin courts to assure a fair trial. Petitioner was determined to not be entitled to property in his view after receipt by the trial court of information outside the record both

on the facts and on the law to be applied to them without giving petitioner notice or the right to confront the person giving such information and advice or the right to be heard in response to such assertions. If petitioner is correct in his contention then his due process rights guaranteed by the Fourteenth Amendment were violated. In any event the procedure followed to determine this matter was defective and in violation of the Fourteenth Amendment itself.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Wisconsin.

Respectfully submitted,

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May 15, 1980

APPENDIX

The order of the Supreme Court of Wisconsin denying petitioner's motion for reconsideration follows:

Office of the Clerk
SUPREME COURT
STATE OF WISCONSIN

Madison, December 21, 1979

TO: August E. Fabyan, Jr.
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Hartland, WI 53029

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735 No. Water St., Suite 928
Milwaukee, WI 53202

The Court today announced an order in your case as follows:

MARTIN HEISE v. VILLAGE OF PEWAUKEE, #76-749.

Motion for Reconsideration denied without costs.

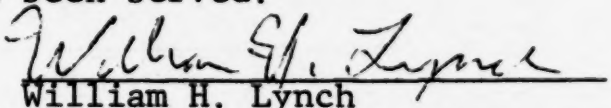
C. J. Beilfuss took no part.

MARILYN L. GRAVES
Clerk of Supreme Court

The opinion of the trial court, the transcript of proceedings in this matter on February 22, 1977, before the trial court, and the opinion of the Supreme Court of Wisconsin are contained in the continuation of this appendix which has been separately bound in accordance with the provisions of Rule 23(f) and (i) of the United States Supreme Court.

CERTIFICATE OF SERVICE

I hereby certify that on this 17 day of May, 1980, three copies of the petition for writ of certiorari were mailed, postage prepaid, to Mr. Timothy P. Garrity, Attorney at Law, 2505 No. Mayfair Road, Milwaukee, Wisconsin 53226, counsel for the respondent. I further certify that all parties required to be served have been served.



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Attorney for Petitioner

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